82-2051

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

GIDDINGS & LEWIS MACHINE TOOL COMPANY,
Petitioner

v.

JOHN AND PATRICIA TRAPANESE,
Respondent

v.

HONORABLE LOUIS H. POLLAK,
Respondent

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. DID THE DISTRICT COURT PROPERLY EXERCISE ITS DISCRETION IN ORDERING A NEW TRIAL, AND DID THE THIRD CIRCUIT COURT OF APPEALS CORRECTLY REFUSE TO EXERCISE ITS DISCRETION TO REVIEW THE DISTRICT COURT'S ORDER BY MANDAMUS?

2. WHERE THE TRIAL COURT EXERCISED ITS DISCRETION BY ORDERING A NEW TRIAL TO CORRECT AN ERROR WHICH WAS REPEATEDLY PRESERVED ON THE RECORD, DID THE CIRCUIT COURT PROPERLY EXERCISE ITS DISCRETION BY REFUSING TO ISSUE A WRIT OF MANDAMUS TO REVIEW SUCH ORDER?

3. IS THERE ANY BASIS IN LAW OR FACT, EVEN UNDER THE EXPANSIVE CONSTRUCTION URGED BY PETITIONER, FOR THE ISSUANCE OF A WRIT OF MANDAMUS IN THE CONTEXT OF THIS CASE?

4. DOES PETITIONER'S GROUNDLESS AND FRIVOLOUS ATTEMPT TO CIRCUMVENT AND PERVERT LONG STANDING FEDERAL COURT PRACTICE REQUIRE THE IMPOSITION OF APPROPRIATE SANCTIONS?

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STATEMENT OF THE CASE

This is a strict liability case instituted pursuant to §402A of the Restatement of Torts 2d. Plaintiff, John Trapanese, was operating a Vertical Boring Mill manufactured by Defendant, Giddings and Lewis, when he inadvertently contacted an unguarded operating button on the machine's pendant control station. This caused the mill to begin rotating, ensnaring Plaintiff's left hand, resulting in the traumatic amputation of most of his left hand.

The case was tried before the Honorable Louis H. Pollak for a total of eight days, the substantial portion of said time being consumed by evidentiary arguments, and by Petitioner's unsupported collateral attacks on the credibility of Respondents' expert witness, Lester Moskowitz, R.P.E., said attacks having compelled Judge Pollak to render corrective jury instructions after several lengthy in camera proceedings. The jury deliberated for two and one-half days, returning during the time to ask no less than three (3) questions concerning the definition and elements of proximate cause. The jury entered a verdict for the Defendant on December 27, 1982, and judgment was recorded on the verdict on December 28, 1982.

Within ten (10) days of the entry of the judgment for Defendant, Plaintiff filed a Motion for a New Trial (a copy of which is included in Respondents' Appendix A). One of the primary grounds asserted by Plaintiffs was that the jury was inappropriately permitted to consider the issue of Plaintiff, John Trapanese' contributory negligence in the context of this strict liability case. Judge Pollak's Memorandum/Order of January 4, 1983, granting a new trial pursuant to Rule 59(d) of the Federal Rules of Civil Procedure, was premised on the Court's recognition of the impropriety of its permitting the jury to consider the issue of contributory negligence.

During the course of the trial of this case, the Defendant, Giddings and Lewis, continually offered evi-

dence that Plaintiff, John Trapanese' own neglect caused his accident. Initially, John Trapanese himself admitted having inadvertently bumped the pendant station. Defendant offered additional evidence that Mr. Trapanese should have been aware of the location of the pendant control station at all times, and that perhaps Mr. Trapanese himself activated the mechanism which severed his hand. Counsel for Defendant repeatedly asked Mr. Trapanese' co-employees if they had ever inadvertently activated the vertical boring mill through contact with the pendant station. There was sufficient evidence for the jury to conclude that Mr. Trapanese' own negligent conduct was the substantial cause of his accident. The Trial Court's Memorandum/Order of January 4, 1983 was therefore based on far more than, as alleged by Petitioner, mere "speculation".

Based upon the evidence presented by Giddings and Lewis Machine Tool Company, the Plaintiffs had submitted a set of proposed Supplemental Points for Charge, which included a point directing the jury not to consider Mr. Trapanese' contributory negligence, all of which were denied by the Trial Court. (A copy of Planitiffs' Supplemental Points for Charge is included in Respondents' Appendix B). Plaintiffs continually renewed their request for this charge throughout the jury's deliberations, but the Trial Court declined to so charge.

After trial, and after having the opportunity to reflect at length on this issue, the Trial Court recognized that it had erred in not charging the jury as Plaintiffs had requested. On January 4, 1983, Judge Pollack vacated the Judgment and ordered a new trial. Judge Pollak's Order was based on the clear inferences to be drawn from the record in its entirety, the questions posed by the jury, as well as the ultimate determination reached by the jury. There is not a scintilla of evidence, nor has Petitioner suggested that any evidence exists, to support its audacious assertion that the Trial Court or-

dered a new trial because the Trial Court was of the opinion that the jury verdict constituted an "undesirable outcome". Petition for Writ of Certiorari, page 4. Petitioner thereafter filed a Petition for a Writ of Mandamus with the Third Circuit Court of Appeals, which was denied without opinion by Order of March 24, 1983. A Pre-Trial Conference was immediately scheduled by Judge Pollak, but was cancelled when Defendant's counsel indicated that a Petition for Certiorari would be filed "very soon". (A copy of Judge Pollak's letter confirming this fact is contained in Respondent's Appendix C). Eighty-two days after the filing of the Third Circuit's Order, Petitioner, Giddings and Lewis Machine Tool Company, filed the instant Petition for Certiorari, presenting the same arguments which were rejected by the Third Circuit.

REASONS WHY WRIT SHOULD NOT ISSUE

Pursuant to the authority granted by Rule 59(d) of the Federal Rules of Civil Procedure, the District Court properly exercised its discretion in ordering a new trial of this case. The Court's ruling was premised on a finding that in the context of this strict liability case, the jury was improperly permitted to consider the issue of Plaintiff, John Trapanese' contributory negligence, contrary to well established Pennsylvania law. This issue was carefully and repeatedly preserved by Respondent's counsel, since the omission of the requested charge was critically prejudical to the Plaintiffs' case. Petitioner has not offered, nor can it offer, any evidence supporting its argument for the issuance of a writ of mandamus. There was no "clear abuse of discretion" or "usurpation of judicial power"; Petitioner has available to it "other adequate means to attain the relief sought" (i.e., appeal after a second trial); and there is absolutely nothing in the record which would indicate a "likelihood of recurrence". There exists no basis for the issuance of a Writ of Mandamus, and therefore the instant Petition must be denied.

I. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN ORDERING A NEW TRIAL, AND THE THIRD CIRCUIT CORRECTLY REFUSED TO EXERCISE ITS DISCRETION TO REVIEW THE DISTRICT COURT'S ORDER BY MANDAMUS

Petitioner has come before this Court seeking extraordinary relief in the nature of the issuance of a Writ of Mandamus. Respondents respectfully submit that Petitioner has failed to allege facts which would support the granting of such relief; such facts simply do not exist in the context of this case. The filing of this Petition by Defendant, Giddings and Lewis, is nothing more than a transparent attempt to circumvent the final judgment rule, and has already resulted in substantial undue delay and expense — which is precisely what Petitioner purports to be attempting to avoid.

This Honorable Court has recently considered the issue of the scope of review by a Petition for Writ of Mandamus of an Order granting a new trial. *Allied Chemical Corporation, et al, Petitioners v. Daiflon, Inc.*, 449 U.S. 33, 66 L.Ed. 2d 193, 101 S.Ct. 188 (1980). *See also, U.S. v. Mehrmanesh*, 652 F.2d 766, 770 (9th Cir. 1980); *Kerr v. U.S. District Court for the Northern District of California*, 426 U.S. 394, 48 L.Ed. 2d 725, 96 S.Ct. 2119 (1976).

A review of the *Allied Chemical* decision reveals that the Petitioner herein has failed to recognize the distinction between the standard for review on appeal from a final judgment and the standard for review on a Petition for Writ of Mandamus.

Allied Chemical was a federal antitrust suit in which a jury awarded the plaintiffs $2.5 million in damages. The District Court thereafter granted the defendants motion for a new trial, acknowledging in its order that it had erred during trial in certain of its evidentiary rulings. The United States Court of Appeals for the Tenth Circuit issued a writ of mandamus directing the District Court to restore the jury verdict as to liability, while permitting the District Court to proceed with a

new trial on damages. On petition for writ of certiorari, the order of the Court of Appeals granting the writ of mandamus was reversed. The Supreme Court reiterated the very limited circumstances under which a writ of mandamus could properly be granted:

> This Court has recognized that the writ of mandamus "has traditionally been used in the federal courts only to 'confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' " *Will v. United States, supra*, at 95, 19 L Ed 2d 305, 88 S Ct 269, quoting *Roche v. Evaporated Milk Assn.* 319 US 21, 26, 87 L Ed 1185, 63 S Ct 938 (1943). Only exceptional circumstances, amounting to a judicial usurpation of power, will justify the invocation of this extraordinary remedy. *Will v. United States, supra*, at 95.

Id. 449 U.S. at 35, 66 L.Ed. 2d at 196.

The only accepted basis for mandamus review are jurisdictional excess and a clear abuse of discretion or usurpation of judicial power. The body of case law dealing with such jurisdictional issues typically concerns orders which are entered after a prescribed time period has expired, *see, e.g., Peterman v. Chicago, Rock Island and Pacific Railroad Co.*, 493 F.2d 88 (8th Cir. 1974), or which are entered in situations where the district court has failed to adhere to an order of the court of appeals. *See, e.g. Citibank; N.A. v. Fullam*, 580 F.2d 82 (3rd Cir. 1978), and numerous cases cited therein. The Order of the District Court in the matter *sub judice* was entered in strict conformity with Rule 59(d) of the Federal Rules of Civil Procedure, within ten (10) days of the date of the entry of judgment on the jury's verdict. There is nothing in the case law that would justify a fictitious expansive argument that there was action in excess of jurisdiction even if, arguendo, the court issued what may have been an erroneous discretionary ruling. As

was stated in *Cooper v. Midwest Feed Products Company*, 271 F. 2d 177, 179 (8th Cir. 1959):

> As the court had jurisdiction to enter the order, it had jurisdiction to enter a correct or an erroneous order. We express no opinion as to the correctness of the order further than to say that it was certainly not entered in clear abuse of the court's discretion.

Any allegation that the Trial Court acted outside the scope of its jurisdiction is unsupported in law or fact.

The only other situation in which mandamus can issue to reverse a grant of a new trial is where the Trial Court commits a clear abuse of discretion. *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383, 74 S.Ct. 145, 98 L.Ed. 106 (1953); and *Grace Lines v. Motley*, 439 F.2d 1028 (2nd Cir. 1971). As held by the Third Circuit Court of Appeals in *Citibank v. Fullam*, 580 F.2d 82, 86 (3rd Cir. 1978), a finding of such abuse can be arrived at only under "extraordinary circumstances":

> The remedy of mandamus is a drastic one and should be invoked only under extraordinary circumstances. As the Supreme Court stated in *Will v. United States*, only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy. The reasons for this judicial reluctance to grant writs of mandamus are twofold. First, a mandamus action has the undesirable consequences of making a district court judge a litigant. More importantly, granting writs of mandamus in less than extraordinary situations would foster piecemeal litigation and would thus frustrate Congress' preference for appellate review only after final judgments. (citations omitted)

Judge Pollak ordered a new trial pursuant to a proper exercise of discretion, after concluding that the jury had erroneously been permitted to consider John Trapanese'

contributory negligence. The Trial Court's actions were well within its discretionary powers, and can hardly be considered a "judicial usurpation of power." *Id.*

This Court has taken the foregoing principles one step further, and has established a specific two-fold test for entitlement to relief:

> In order to insure that the writ will issue only in extraordinary circumstances, this Court has required that a party seeking issuance have no other adequate means to attain the relief he desires, *ibid. Roche v. Evaporated Milk Assn., supra*, at 26, 87 L Ed 1185, 63 S Ct 938, and that he satisfy the "burden of showing that [his] right to issuance of the writ is 'clear and indisputable.' " *Bankers Life & Cas. Co. v. Holland, Supra*, at 384, 98 L Ed 106, S Ct 145, quoting *United States v. Duell*, 172 US 576, 582, 43 L Ed 559, 19 S Ct 286 (1899).

Allied Chemical Corp. v. Daiflon, Inc., supra, 449 U.S. at 35 66 L. Ed 2d at 197. Applying this test to the facts of this case, it is readily apparent that Petitioner Giddings and Lewis cannot even begin to meet its burden.

The first question is whether Petitioner has other means to attain the desired relief. Petitioner seeks relief from an Order granting a new trial, despite the fact that such an Order is considered interlocutory in nature and therefore not immediately appealable as a final judgment under 28 U.S.C.A. §1291.[1] *Wiggs v. Courshon*, 485 F.2d. 1281 (5th Circuit, 1973); *General Motors Corporation v. Lord*, 488 F.2d. 1096 (8th Circuit, 1974); Wright and Miller, *Federal Practice and Procedure*, Civil §2818 et seq. However, pursuant to the terms of 28 U.S.C.A §1291, Petitioner has an automatic right of appeal from such Order after the entry of final judgment. This procedure provides Petitioner with the necessary

1. 28 USCA §1291 in relevant parts read as follows: The courts of appeals shall have jurisdiction of appeals from all *final* decisions of the district courts of the United States . . .(emphasis added).

means to attain the desired relief. As held by this Court in *Allied Chemical, supra,* an order granting a new trial is commonplace and is always subject to proper appellate review:

> A trial court's ordering of a new trial rarely, if ever, will justify the issuance of a writ of mandamus. On the contrary, such an order is not an uncommon feature of any trial which goes to verdict. A litigant is free to seek review of the propriety of such an order on direct appeal after a final judgment has been entered. Consequently, it cannot be said that the litigant "has no other adequate means to seek the relief he desires."

Id. 449 U.S. at 36, 66 L.Ed. 2d 197.

The second part of this Court's *Allied Chemical* test requires Petitioner to demonstrate that its "right to issuance of the writ is 'clear and undisputable.' " *Id.* Respondents again submit that the Trial Court's Order was nothing more than a sound exercise of discretion. Its decision was based on a fundamental, and in the context of this case, undisputed, legal principle that contributory negligence is not a defense to a strict liability suit in Pennsylvania. Having presided over the eight day trial of this case, Judge Pollak is best able to determine whether there was evidence presented from which the jury may have concluded that John Trapanese was contributorily negligent. A reversal of his Order would be nothing more than an improper substitution of one discretionary judicial opinion for another.

While Petitioner is entitled to disagree with the Trial Court's reasoning, it has offered nothing to suggest a clear abuse of discretion. Drawing again on this Court's opinion in *Allied Chemical Corp., supra,* it is apparent that the Trial Court did no more than properly exercise its discretionary power:

> The authority to grant a new trial, moreover, is confided almost entirely to the exercise of discretion

> on the part of the trial court. Where a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is "clear and indisputable." *Will v. Calvert Fire Ins. Co.*, 437 US 655, 666 57 LEd 2d 504, 98 SCt 2552 (1978) (plurality opinion).
>
> To overturn an order granting a new trial by way of mandamus indisputably undermines the policy against piecemeal appellate review. Under the rationale employed by the Court of Appeals, any discretionary order, regardless of its interlocutory nature, may be subject to immediate judicial review. Such a rationale obviously encroaches on the conflicting policy against piecemeal review, and would leave that policy at the mercy of any court of appeals which chose to disregard it.

Id.

A decision which perhaps best illustrates the impropriety of the relief Petitioner seeks is *General Motors Corporation v. The Honorable Miles W. Lord, et al*, 488 F.2d 1096 (8th Cir. 1973). That case involved a suit for damages for an alleged wrongful termination of franchises. After the jury returned a verdict for the defendant franchisor, the Trial Court granted a new trial because the Trial Judge was of the belief that he had erroneously permitted the jury to consider evidence of dealership agreement breaches which the franchisor did not assert as reasons for the termination of franchises. Whether or not the jury actually weighed such evidence in reaching its verdict was a determination which only the Trial Court, in the exercise of its sound discretion, could have made. The Court of Appeals therefore refused to substitute its own judgment for that of the Trial Court:

> The evidentiary issues confronted by the trial court, with respect to whether GM could rely on non-assigned reasons for termination as a defense

> to the law suit, are not simple. The trial judge's resolution of the issue is not without support. *See, e.g., Ohio & Mississippi R.R. v. McCarthy*, 96 U.S. 258, 267-268, 24 L.Ed. 693 (1877); *Luckenbach S.S. Co., Inc. v. W.R. Grace & Co., Inc.*, 267 F. 676, 679 (4th Cir.), cert. denied, 254 U.S. 644, 41 S.Ct. 14, 65 L.Ed. 454 (1920). On the other hand, resolution of the matter as GM urges also has support. *See, e.g., College Point Boat Corp. v. United States*, 267 U.S. 12, 16, 45 S.Ct. 199, 69 L.Ed. 490 (1925); 3 A. Corbin, Corbin on Contracts §762 at 524-526 (1960). Without intending to express an opinion on the merits, it is clear that the trial court's resolution of the issue was not so blatantly wrong as to justify the issuance of mandamus.

Id. 488 F.2d at 1100 (footnotes omitted).

In the case now before this Court, Judge Pollak was of the considered opinion that the jury was improperly permitted to consider the issue of John Trapanese' contributory negligence. He alone is in the position to weigh all of the evidence, consider the propriety of his corresponding instructions, and reach a determination as to whether the jury's verdict may have been tainted by improper considerations. This is a classic example of a proper exercise of discretion. This case is no different than *General Motors, supra*, and Petitioners request for the issuance of a writ of mandamus must be denied for the same reasons expressed by the Court of Appeals in that case:

> This evidentiary question, which was the essential question addressed by the trial court, is no different than any other evidentiary issue trial judges decide in the course of granting motions for new trial. To grant extraordinary relief here would be to abrogate the final judgment rule, and allow any litigant, who is forced to retrial on an

> evidentiary question, immediate review simply by styling his action a petition for writ of mandamus instead of appeal. The resolution of this question at this time would have little impact on the administration of justice generally and, since it is clear that the trial court had jurisdiction to act, mandamus is clearly inappropriate.

Id.

II. WHERE THE TRIAL COURT EXERCISED ITS DISCRETION BY ORDERING A NEW TRIAL TO CORRECT AN ERROR WHICH WAS REPEATEDLY PRESERVED ON THE RECORD, THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION BY REFUSING TO ISSUE A WRIT OF MANDAMUS TO REVIEW SUCH ORDER

Petitioner's argument is premised upon little more than a gross distortion of the record and a misunderstanding of the law. The Trial Court's Order granting a new trial was issued, because, after giving the matter careful consideration, it found that the jury should have been instructed not to consider the irrelevant issue of contributory negligence. This decision was supported by the evidence offered at trial, the arguments of counsel, the questions posed by the jury during its deliberations and the verdict ultimately rendered. This was far more than the mere "speculation" which Petitioner asserts was the basis for the Trial Court's decision.

Based on the evidence presented by Petitioner at trial, counsel for Respondents both offered a point for charge on the contributory negligence issue, and repeatedly urged the Trial Court to instruct the jury not to consider Mr. Trapanese' own negligence. It is difficult to conceive of any other manner in which this issued could have been preserved. Petitioner suggests none, but nonetheless makes the bald allegation that ". . . Respondent failed to properly preserve the issue upon which the Trial Court relied. . ." Petition for Writ of Certiorari, page 10.

Petitioner cites the following four decisions in support of its argument: *Skill v. Martinez*, 677 F.2d 368 (3rd Cir. 1982); *Kube v. Bethlehem Steel Corp.*, 390 F.2d 506 (3rd Cir. 1968); *Lind v. Schenley Industries, Inc.*, 278 F.2d 79, 90 (3rd Cir.), cert. denied, 364 U.S. 835, 81 S.Ct. 58 (1960); and *O'Neil v. D. R. Grace and Company*, 410 F.2d 908, 914 (5th Cir. 1969). Petition for Writ of Certiorari, pages 10-11. While it is submitted that ultimately, on proper appellate review after a new trial, the Trial Court's action will satisfy the requirements set forth in these decisions, Petitioner blatantly ignores the fact that the standard of review on a Petition for Writ of Mandamus is far more strict than on an appeal from a final judgment. "Mandamus" was not mentioned in any of the cited decisions. Petitioner does not even consider (as required by the governing case law) whether or not there was a "clear abuse of discretion", a "usurpation of judicial power", or whether it has other available means of attaining the relief sought.

The following review of the record demonstrates why Petitioner was reluctant (or perhaps unable) to address the real issues raised by the instant Petition:

Plaintiff, John Trapanese was operating a Vertical Boring Mill manufactured by Defendant, Giddings and Lewis when he inadvertently contacted an unguarded operating button on the machine's pendant control station. This caused the mill to begin rotating, resulting in a traumatic amputation. Pursuant to §402A of the Restatement of Torts 2d, the Plaintiffs contended that the subject boring mill was defectively designed in that the various operating mechanisms on the pendant control station were unguarded.

Petitioner offered a litany of defenses, but the common thread running between all of such defenses was an effort to convince the jury that in some way Mr. Trapanese carelessly caused his own accident. Initially, John Trapanese himself admitted having inadvertently bumped the pendant station.

Therefore, whether or not the jury even reached the question of the defective nature of the operating mechanism, they could have improperly concluded that Mr. Trapanese' own negligence was the substantial cause of his accident, and that any other contributing factors were insignificant. Had the jury been properly precluded from considering Mr. Trapanese' own conduct, their deliberations would have had to have focused on whether the unguarded buttons were defective, and whether they were a substantial factor contributing to the happening of the accident.

Defendant, Giddings and Lewis offered additional evidence that Mr. Trapenese should have been aware of the location and direction of the pendant control station at all times and that perhaps Mr. Trapanese himself activated the mechanism which severed his hand. Counsel for Defendant repeatedly asked Mr. Trapanese' co-employees if they had ever inadvertently activated the vertical boring mill through contact with the pendant station. Repeated references were made by Defendant's counsel to Mr. Trapanese' failure to set a gear switch, which purportedly may have prevented the accident. Mr. Trapanese was also questioned as to whether he may have slipped on grease or oil which he allowed to accumulate in the work area. Defendant's counsel also speculated before the jury that Mr. Trapanese may have allowed loose debris or a flying metal clip to activate the machine. There was thus more than sufficient evidence for the jury to conclude that Mr. Trapanese' own negligent conduct was the substantial cause of his accident. Thus properly viewed in the context of the full record, the Trial Court's Memorandum/Order of January 4, 1983, was certainly premised on a sound evidentiary base, and went well beyond the pure "speculation" alleged by Petitioner.

Petitioner's gross distortion of the trial record becomes abundantly clear, to the point of being repugnant, when one considers Petitioner's argument that the Trial

Court's Order was based on an issue not properly preserved for appellate review. Petitioner's need to resort to misleading selective citation from the record lays bare the frivolous and baseless nature of Petitioner's entire argument. The record demonstrates beyond dispute that Respondent repeatedly and forcefully preserved for review the issue of the Trial Court's failure to charge the jury that contributory negligence was not a defense to be considered:[2]

During the course of the trial, based upon the evidence presented by Giddings and Lewis Machine Tool Company, the Plaintiffs submitted a set of proposed Supplemental Points for Charge, which included a point directing the jury not to consider Mr. Trapanese' contributory negligence. (See Respondents' Appendix B). All of these proposed points were denied in an in chambers, off-the-record conference before Judge Pollak, (unfortunately, there was no transcription of any of the extensive discussions between counsel and the Trial Court concerning the multitude of Proposed Points for Charge) to which Plaintiffs' counsel took a general exception. Counsel for Respondent never acquiesced in the Court's decision. Petitioner chooses to ignore Respondents' submission of this Proposed Point for Charge, as well as the colloquy which followed the conclusion of the Court's charge:

> THE COURT: You can tell me now where I have slipped up if there are things *other than what we have already had discussions about and rulings on.*
> MR. SCHWARTZ: Your Honor, I take no issue with the charge as given. *Some of the Plaintiffs' requested points were not given,* but I assume that it's the Court's position they are in fact covered.

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2. It is interesting to note that at no time has Petitioner challenged Respondent's construction of the law in this regard — i.e., it is undisputed that contributory negligence is not a defense to a §402A product liability claim under Pennsylvania law.

> THE COURT: That is my belief, yes.
> (Emphasis added.)

The Court was not inviting discussion on matters previously disposed of which, as clearly indicated by Respondents' counsel, included, *inter alia*, the requested point for charge dealing with contributory negligence. The fact that the omission to charge as requested remained as Respondents' counsel's foremost concern is borne out by his repeated efforts to convince the Court not to permit the jury to consider the issue of contributory negligence.

On the first day of its deliberations, the jury returned to ask several questions, expressing its confusion over the charge as given. One question was whether the alleged defect in the boring mill had to be "the primary or the most probable cause of the accident, or was it only necessary to feel that it contributed to the accident." Petitioner's Appendix, 10a. This question presented to Plaintiffs' counsel another clear indication that the jury was considering John Trapanese' negligent conduct, and Plaintiffs' counsel therefore strenuously argued that the jury should be instructed not to consider any evidence of contributory negligence:[3]

> MR. SCHWARTZ: Your Honor, I have a distinct impression that what is going through the minds of the jurors here is the conduct on the part of Mr. Trapanese as being one of the things that they are considering in light of the argument —
> (Petitioner's Appendix, 17a.)

After an interruption, Mr. Schwartz continued:

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3. An appreciation of the extent to which this point was "brought home" to the Trial Court requires a reading of all of the discussions between the Court and counsel. However, *since Petitioner failed to cite a single quote* from Respondent's revealing arguments, the most salient portions of Respondent's arguments are set forth herein.

> Your Honor, I have a feeling that this jury is now in its deliberations on proximate cause, weighing the conduct of Mr. Trapanese in relationship to the operation of the machine, particularly in connection with certain arguments made by counsel concerning Mr. Trapanese' positioning the pendant station. We had asked for a charge that contributory negligence is not a defense to this case, as was assumption of risk. We still don't believe assumption of risk is necessarily at issue, but I believe it is important, since the jury is now talking about conduct, what caused this, that the jury be instructed that no conduct on the part of Mr. Trapanese can play any part in their deliberations, because contributory negligence or any conduct on his part is not a defense to a strict liability lawsuit. Counsel interjected this during the trial, your Honor. You are aware I objected to it because I said contributory negligence is not a defense. He argued that point tangentially in his summation and we asked for a point for charge on it.
> (Petitioner's Appendix A-18)

Although the Court disagreed at that time, Mr. Schwartz pressed his point further:

> MR. SCHWARTZ: Your Honor, I think the charge is less open in the minds of the jurors that possibly the conduct of Mr. Trapanese could be a substantial factor in bringing it about, i.e., positioning the pendant station so that he hits it or that he in fact might have hit it in some other fashion. In other words, I think what it's done is it's left the jury open to consider his conduct as being a substantial factor in bringing about the happening of the accident, when such would not be a defense to a 402(a) case, especially in light of the arguments made by defense counsel and the evidence that he put on this record about the twisting, if Your Honor recalls, the twist-

> ing of the buttons, so that it faces the machine as opposed to facing away from the machine, where the Plaintiff positioned the specific pendant station. Counsel said that he was there to establish it in terms of how the accident happened, and for that reason the Court let it in, but now the jury is talking about was his conduct, or thinking about whether his positioning was a substantial factor in bringing about this accident.
> (Petitioner's Appendix, A-19)

Mr. Schwartz made Respondent's position vividly clear, and afforded the Trial Court every opportunity to correct its error (despite Petitioner's absurd claim that this was not done):

> MR. SCHWARTZ: Your Honor, I agree to that point, but when the jury comes in with a question, and that question leaves open the fact that they are considering a defense, or the possibility that they may be considering a defense which under the law is not a defense, I see it as the obligation of the Court to instruct them that they are not to consider any conduct on the part of Mr. Trapanese as being a substantial factor, because that would go to a defense that are not entitled to have.
>
> I am not taking away the charge as given; it's correct. But the jury here must be considering, based on what we have in the way the case has developed, must be considering his conduct.
> (Petitioner's Appendix, A 19-20)

Respondent's counsel even proposed a method by which the Court's error might have been corrected without prejudice to either party:

> MR. SCHWARTZ: Your Honor, I was under the impression, your Honor, that it would be almost obligatory on the Court when the jury poses a question which has built into it the possibility that they may

> well be considering the defense to a suit which is not a defense, that it should be done. Now, Your Honor has a valid point of taking it totally out of context, so I would suggest, your Honor, you read back exactly what you have read, but simply adding the sentence that this would not apply to any conduct on the part of plaintiff as a substantial factor, and just read it again, read it without any contributory negligence, just add in a little sentence as you read it back to them, and it will be an instruction to them but not out of context, so that the jury doesn't think that anything Mr. Trapanese did, i.e., mispositioning the pendant station, swinging it, getting off without looking, are substantial factors in bringing about this accident.
> (Petitioner's Appendix, 21)

On its second day of deliberations, the jury again returned to the courtroom to ask for "a restatement of the answer to our second question yesterday . . . " Memorandum/Order of January 4, 1983. Counsel and the Court engaged in a further colloquy concerning whether or not the jury should be instructed not to consider Mr. Trapanese' own conduct. Respondent's counsel re-argued his position, this time making reference to Pennsylvania's landmark decision holding that negligence is not to be considered in a 402A products liability case:

> MR. SCHWARTZ: Well, I agree, Your Honor, that this is proper for you to say, "No, it does not have to be the primary."
>
> I think the jury is inviting your Honor to discuss with them the issue of whether or not the Plaintiff's conduct can have anything to do with the occurrence in the proximate cause sense because primary, as I understand it, means first in time element.

> I assume what they are talking about is the primary incident would have been the Plaintiff backing into it. I think again we are back to the issue that the jury is hung up on the plaintiff's conduct as it relates to proximate cause and based on the *Berkabile* [Berkabile v. Brantley Helicopter Corp., 462 Pa. 83, 337 A.2d 893 (1975)] decision, the Court has, as I see it, the obligation to tell the jury that the Plaintiff's conduct can play no part in determining the liability because his acts do not relate to any defense in this case, and I think that's what their hang-up is, and that is why I indicated that that has to be clarified, because in terms of sequence, the first thing that would happen would be the Plaintiff backed up and hit a button. That would be the prime sequence of events.
> (Petitioner's Appendix, A 25-26)

There is much more on the record. Respondent challenges Petitioner to examine the above quotations from the record, and to advise Respondent and this Honorable Court how it intends to substantiate its argument that ". . . counsel failed to preserve any claim of error . . ." Petition for Writ of Certiorari, page 16.

The Court's decision not to charge as requested by Plaintiffs' counsel, reached in the heat of the trial, was premised on the Court's desire not to introduce the concept of contributory negligence to the jury. However, as evidenced by the Court's Post-Trial Memorandum/Order granting a new trial, upon further reflection after trial, the Court was of the opinion that there was evidence before the jury of Mr. Trapanese' own negligence. Therefore, the Court concluded that it was prejudicial error *not* to charge the jury to ignore such evidence. When the jury asked whether the alleged defect had to be "the primary or most probable cause of the accident", the only other thing they could have been considering was John Trapanese' conduct. Having been permitted to zero

in on such evidence, the jury was free to conclude that Mr. Trapanese' negligence was the substantial cause of his accident, regardless of whether or not they found that there were other contributing causes such as unguarded operating mechanisms. Judge Pollak had given the jury six (6) elements to consider in his original charge, a copy of which is included in Respondent's Appendix D. Since the jury had obviously reached the element number six (6), proximate cause, they had to have determined that there was a product defect (element number four (4)). Their verdict is therefore further proof that their foremost concern was John Trapanese' contributory negligence.

Judge Pollak ordered a new trial because he was of the opinion that the jury was improperly permitted to consider contributory negligence in its deliberations. His error was repeatedly raised during trial, jury deliberations and in Respondent's Post Trial Motions. His decision was based on his first hand knowledge of the entire record, and is supported by all of the legal authorities. Such an Order granting a new trial is purely discretionary. There is simply no basis for concluding that there was a "clear abuse of discretion" or a "usurpation of judicial power", and, therefore, the Petitioner for Writ of Certiorari before this Court must be denied.

III. THERE IS NO BASIS IN LAW OR FACT, EVEN UNDER THE EXPANSIVE CONSTRUCTION URGED BY PETITIONER, FOR THE ISSUANCE OF A WRIT OF MANDAMUS IN THE CONTEXT OF THIS CASE

Dissatisfied with the most recent pronouncement of this Court in *Allied Chemical Corp. vs. Daiflon, Inc., supra,* Petitoner's last resort is to plead for an expansive construction and application of the readily distinguishable 1957 decision in *LaBuy v. Howes Leather Co.,* 352 U.S. 249 (1957). Consistent with its approach to its first two argments, Petitioner totally ignores the facts of this case in presenting its third and final argument.

Assuming *arguendo* that the concept of "supervisory" mandamus has survived the twenty-six (26) years of inactivity since this Court's rendition of its *LaBuy* decision,[4] the full scope of the "supervisory" mandamus concept (if it exists at all) does not even begin to encompass the matter *sub judice*. The import of *LaBuy* has never been expanded beyond its own facts. That case involved the conduct of a single District Court judge who inappropriately referred complex, multi-party antitrust litigation for hearing by a master. The same judge had referred eleven (11) cases to masters over a six (6) year period. This Court found that there was ". . . an impelling reason for trial before a regular, experienced trial judge rather than before a temporary substitute appointed on an ad hoc basis and ordinarily not experienced in judicial work." *Id* at 259, 1 L.Ed. 2d at 299. The Court granted extraordinary relief in *LaBuy* primarily because of the continued pattern of aggregious conduct on the part of the trial judge, and the likelihood that it would continue. Although this crucial point is ignored by Petitioner, the commentator on whom Petitioner places heavy reliance makes this point abundantly clear:

> The implication has arisen from *LaBuy* that mandamus may be used to discourage an erroneous practice and prevent its recurrence, and in this context *it is the likelihood of recurrence and the need to prevent it that are the critical factors,* not the jurisdictional excess or usurpation of power which were determinative under the traditional standard.

(Emphasis added) *Can the Federal Courts Keep Order in their Own House? Appellate Supervision through Man-*

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4. Respondents submit that the Petition now before this Court must be dismissed before this issue is even reached, and are therefore willing to concede the existence of such concept for the sake of argument to facilitate the expeditious disposal of the frivolous Petition now before this Court.

damus and Orders of Judicial Council, 1980 B.Y.U.L. Rev. 233, 241 (1980) (footnotes omitted).

Petitioner makes the audacious accusation that ". . . in this instance, as in *LaBuy*, the likelihood of recurrence is great and the need to prevent such recurrence is paramount." Petition for Writ of Certiorari, page 23. Petitioner does not offer a single fact in support of this scandalous accusation against Judge Pollak, one of the most respected jurists on our Federal District Court bench. The Trial Judge's discretionary ruling was based on his application of the law to the facts of record in this case. There is no evidence that Judge Pollak has ever granted a new trial pursuant to Rule 59(d), and, even if he has, there is nothing to indicate that any other case even resembled the case presently at issue. This case presents an isolated instance of a Trial Court granting a new trial. Just as a multitude of litigants in our Federal Court system have for decades awaited their opportunity to be heard after a final judgment is entered, Petitioner will have to wait as well. There is nothing in this record to support Petitioner's transparent attempt at circumvention of the mandated final judgment rule.

Reviewing the large body of decisional law on the subject of mandamus, it is apparent that Petitioner is seeking relief which this Court and the Courts across this country have consistently and emphatically denied. As discussed above, this Court has just recently refused to grant mandamus review of a discretionary new trial order. *Allied Chemical Corporation, et al v. Daiflon, Inc., supra*. Even erroneous new trial orders which may ultimately be reversable on appeal are not reviewable by mandamus:

> Courts faced with petitions for the peremptory writs must be careful lest they suffer themselves to be misled by labels such as "abuse of discretion" and "want of power" into interlocutory review of nonappealable orders on the mere ground that they

> may be erroneous. "Certainly Congress knew that some interlocutory orders might be erroneous when it chose to make them nonreviewable." *De Beers Consol. Mines, Ltd. v. United States*, 325 US 212, 223, 225, 89 L Ed 1566, 1575, 1576, 65 S Ct 1130 (1945) (dissenting opinion of Mr. Justice Douglas).

Will v. United States, 389 U.S. 90, 95, 88 S. Ct. 269, 273, 19 L. Ed 2d 305, (1967). See also *U.S. v. Watson*, 603 F.2d 192 (C.C.P.A. 1979). Respondent submits that a re-trial of the instant case is mandated by the facts of record and the governing law. At worst, the Trial Court's Order in this regard was erroneous, and, even if it is, it is simply not reviewable by mandamus.

In the recent case of *In re United States of America, Petitioner*, 598 F.2d 233 (D.C. 1979), the court carefully considered *LaBuy* and *Will*, and decided that mandamus review of a new trial order was inappropriate:

> Nor need we enter the controversy as to whether these doctrines ["supervisory" and "advisory" mandamus] have survived *Will*, for they are inapplicable here. Petitioner is simply disputing the District Court's evaluation of what the "interest[s] of justice" require in this case. It would be singularly inappropriate to review this fact—specific discretionary determination by way of mandamus.

Id. at 238. The case at bar is no different.

IV. PETITIONER'S GROUNDLESS AND FRIVOLOUS ATTEMPT TO CIRCUMVENT AND PERVERT LONG-STANDING FEDERAL COURT PRACTICE REQUIRES THE IMPOSITION OF APPROPRIATE SANCTIONS

The final issue for consideration involves the propriety of Petitioner's conduct in refusing to submit to a second trial of this case. The actual trial of this case took eight days, with substantial portions of that time being consumed by collateral matters, unrelated to the merits

of the case. Now that these matters have been resolved by the rulings of the Trial Court, Respondents submit that this matter can be retried in approximately one week. Petitioner would be hard-pressed to find fault with this assessment, but nevertheless has decided to callously disregard the facts and the law, (and, in particular, the final judgment rule) to Respondents' severe and irreversible prejudice, and has blindly pressed forward to reach our highest appellate Court.

Initially, Petitioner fails to address the fact that the Third Circuit Court of Appeals has already ruled on Petitioner's request for relief. In reviewing that court's denial of the Petition for Writ of Mandamus, it is important to remember that ". . . issuance of the writ is in large part a matter of discretion with the Court to which the petition is addressed." *Kerr v. United States Dist. Ct.*, 426 U.S. 394, 403, 96 S. Ct. 2119, 2124, 48 L.Ed. 725 (1976). This matter was extensively briefed by both parties before the Third Circuit. That Court properly exercised its discretion in denying the relief sought. Petitioner has failed to demonstrate any basis for concluding that the Third Circuit Court of Appeals abused its discretion in deciding as it did. There thus exists no basis for a review of that decision, nor, more importantly, for the filing of the instant Petition for Writ of Certiorari.

The hardship and prejudice to be imposed upon Respondents by discarding well-founded rules of procedure and permitting extensive and time consuming interlocutory appeals, far outweighs the comparably minimal burden of re-trying this case. The "final judgment rule" was designed to prevent piecemeal litigation, and is adhered to in all but the most aggregious of circumstances. In *General Motors Corporation v. Lord*, 448 F.2d 1096 (8th Cir. 1973), the retrial of a matter which had taken seven weeks to try in the first instance was not considered sufficiently burdensome to justify the issuance of a Writ of Mandamus. Of course, even if such burden exists, it must still be demonstrated that the Trial Court clearly

abused its discretion or usurped its judicial power in ordering a re-trial. Not only has Petitioner failed to demonstrate that there was an abuse of discretion or a usurpation of power, but it has failed to consider that its improper attempt at piecemeal appellate review will ultimately prove to be *more burdensome* to the Courts and the litigants than if Petitioner had conformed to the law by having a single, comprehensive appellate review after the entry of a final judgment. This of course is the "other adequate means to attain the relief [Petitioner] desires", the very existence of which precludes review by mandamus.

In view of the fact that Petitioner has full knowledge of the foregoing realities it is truly difficult to imagine how Petitioner's conduct in bringing this matter to the Supreme Court of the United States can be justified. Despite the "lip service" which Petitioner pays to the issue of reducing the burden on our courts, the truth is that it is *Petitioner*, and Petitioner alone, who is placing unnecessary burden on our courts.

The following facts make this assertion self-evident: On January 4, 1983, a new trial was ordered. Had this matter proceeded to trial as scheduled, this case could have been resolved within weeks. All discovery has previously been completed, witnesses, experts and exhibits prepared, and legal arguments resolved. If necessary, a full-blown appellate review of *all* appealable issues could by now have been substantially complete. Instead, because of Petitioner's frivolous actions, six months have been forever lost without this matter having been tried. Many more months may pass before the litigants return to the courtroom, their memories having faded even more with the passage of time. Respondents and their counsel have expended in excess of Ten Thousand Dollars ($10,000.00), in addition to countless man hours, in opposing Petitioner's "mandamus" actions. The sad fact is that all of Petitioner's arguments will have to be re-addressed if a proper appeal is taken after a second trial. In

addition to the litigants', the resources of all three tiers of our Federal Court system have been unnecessarily taxed. These are the burdens which the final judgment rule and the policy against piecemeal litigation are designed to avoid.

Having knowingly abused our court system, Petitioner's frivolous, selfish and myopic approach must not go unpunished. If Petitioner is not sanctioned, every litigant will be invited to seek mandamus review of new trial and similar orders. The final judgment rule and its salutory goals will become little more than history. For these reasons and more, Respondents respectfully request that monetary and any other appropriate sanctions be imposed upon Petitioner pursuant to the authority of Rule 49.2 of the Rules of the Supreme Court. *See, e.g., Elmo C. Tatum, Petitioner, v. Regents of the University of Nebraska-Lincoln, et al,* U.S. , No. 82-6145, June 13, 1983.

CONCLUSION

Even under Petitioner's construction of the law, Petitioner has failed to demonstrate its entitlement to the issuance of a writ of mandamus. It has failed to show an abuse of discretion, a usurpation of judicial power, the absence of other means to attain the desired relief or the likelihood of recurrence. Respondents respectfully submit that the instant Petition for Writ of Certiorari must be denied, and sanctions must be imposed upon Petitioner, if the final judgment rule and its purposes are to be preserved.

Respectfully submitted,
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BY: _____
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